No. 82-1066

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, *Appellant*,
v.
HARRY PTASYNSKI, *et al.*, *Appellees*.

On Appeal from the United States District Court for the District of Wyoming

BRIEF OF TAXPAYER APPELLEES

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QUESTIONS PRESENTED

1. Whether an excise tax on domestic crude oil, which is specifically framed to apply throughout the United States except to a geographically defined area constituting three fourths of Alaska, violates the Uniformity Clause (Article I, Section 8, Clause 1) of the Constitution, which requires that "Excises shall be uniform throughout the United States."

2. Assuming the tax to be unconstitutional, whether the proper remedy is to sever the invalid tax in its entirety from the Internal Revenue Code so that Congress can frame new and uniform legislation of its own design or whether, as the Government contends, this Court should itself rewrite the tax to extend it to the Congressionally exempted areas of Alaska.*

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*The names of all parties in the Court whose judgment is under review are set forth in the caption of the District Court opinion (J.S., 1a). None of the corporate parties has a parent company, subsidiary (other than a wholly-owned subsidiary) or affiliate.

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STATEMENT

A. The Tax and the Alaska Exemption

The Government's brief (Gov. Br. 2-5) describes the general features of the tax imposed by Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229 (hereafter referred to as the "Tax" or the "Windfall Profit Tax"). Its basic structure is succinctly depicted in the chart contained in the District Court's opinion (reprinted at J.S., App. A, 3a). The Tax is specifically identified by Congress as an excise tax. 26 U.S.C. Section 4986(a). It is levied, at rates ranging as high as 70 percent, on so-called "windfall profits"[1]

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[1] The taxable amount, labelled "windfall profit" by the statute, is in fact unrelated to profit. It is basically the difference between the "removal price" (normally price at the wellhead) and the adjusted "base price," which depends upon the "Tier" to which the oil has been assigned and bears no necessary relationship to cost. See 26 U.S.C. §§ 4988(a), 4988(c) and 4989.

from production of oil in 49 states and about one-fourth of Alaska. However, contrary to the Constitution, the Tax is not "uniform throughout the United States." Art. I, Sec. 8, cl. 1.

The Act provides an exemption for oil produced in an area constituting approximately three-fourths of the State of Alaska. See map at App. A. Although the Act contains several exemptions, the Alaska exemption is the only one based upon the geographic location where the oil is produced.[2] "Exempt Alaskan oil" is defined as certain oil produced

> "(1) from a well located north of the Arctic Circle or from a reservoir from which oil has been produced in commercial quantities through such well, or
>
> (2) from a well located on the northerly side of the divides of the Alaska and Aleutian ranges and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System." Section 4994(e).[3]

"Sadlerochit oil" (defined as oil produced from that part of the Sadlerochit reservoir located in the Prudhoe Bay oil field) is, however, excluded from the Alaska exemption. Sections 4994(e), 4996(d)(3).

The scope of the Alaska exemption is vast—not only in area but also in potential oil production sheltered from tax. The exempt area is larger than the combined areas of Texas and Louisiana. Official reports of the United States Geological Survey estimate that by 1986 production from *a single field* in the exempt region (the Kuparuk River field) will equal 250,000 barrels of oil per day. Geological Survey Circular 884 at 17 (1982). If that field were a separate state, such production

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[2] The governmental, charitable and Indian exemptions are based upon the identity of the owners of the production. See §§ 4994(a), (b) and (d). The "front-end tertiary oil" exemption is based on the producer's use of the proceeds to finance expensive tertiary production. See § 4994(c).

[3] The text above reflects technical clarifying amendments. See Technical Corrections Act of 1982, Pub. L. No. 97-448, 96 Stat. 2365. None of the amendments is relevant to this appeal.

would entitle it to rank *seventh* among the oil-producing states, behind only Texas, Louisiana, Oklahoma, California, Wyoming and the non-exempt portions of Alaska. The proven reserves of the Kuparuk River field, however, amount to only 7 percent of the estimated potential reserves attributable to the exempt region.[4] Estimated undiscovered reserves in the exempt area are 17.2 billion barrels, or 21 percent of such reserves for the entire United States.[5]

Without the Alaska exemption, the present Windfall Profit Tax would not have obtained Congressional approval. *All* the seriously considered bills in one form or another exempted Alaskan oil. See pp. 28-29, *infra*. Not only did every serious proposal effectively exempt Alaskan oil, but the adoption by the Senate of an explicit Alaskan exemption was critical both to the Senate's decision to extend the tax to newly discovered oil and to resolution of the stalemate in which the tax bill had become trapped. See pp. 31-33, *infra*.

B. Proceedings Below

Taxpayer appellees[6] brought suit seeking refunds of Windfall Profit Taxes paid on the grounds that the Tax is unconstitutional in violation of both the Uniformity Clause (Art. I, Sec. 8,

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[4] The proven reserves of the Kuparuk River field equal 1.25 billion barrels. See Oil & Gas Journal, March 14, 1983, p. 38. Estimated undiscovered reserves of the exempt area equal 17.2 billion barrels. See *Estimates of Undiscovered Recoverable Conventional Resources of Oil and Gas in the United States*, Geological Survey Circular 860 (1982) at 74-79.

[5] See *id.* at 2, 74-79. The Government seeks to trivialize the scope of the exemption (Gov. Br. 21 n.28), by asserting that "most" of the reserves covered by this estimate are attributable to federal offshore areas to which the Uniformity Clause is inapplicable. However, even if limited to *state* reserves in the exempt area, the reserves equal 6.1 billion barrels or 7.4 percent of such reserves for the United States. Geological Survey Circular 860, pp. 2, 74-79 (1982).

[6] Harry Ptasynski, John Partridge, Berton W. Avery, Goldie Avery, Frederick S. Johnson, and Calvin Petroleum Corporation.

cl. 1) and the Fifth Amendment prohibitions against deprivation of property without due process of law and against the taking of property without just compensation.[7] The principal taxpayer action (C80-302) covered taxes paid for March 1980. A later suit filed by taxpayer appellee Partridge (C82-050), covered taxes paid through the year 1980 and was consolidated with the principal action. See J.S., App. A, 2a.[8]

On November 4, 1982, the District Court awarded refunds to the taxpayer appellees on the grounds that the Tax violated the Uniformity Clause. It held that the Constitution requires that

> "in each state where crude oil is found, the production and removal of that crude oil be subject to the tax and taxed at the same rate. The windfall profits tax ignores this requirement. The Act, on its face, says that one state, Alaska, is not subject to the same tax, at the same rate as all the other states. This is a clear violation of the constitutional requirement of uniformity." J.S., App. A, 7a.

With respect to separability, the District Court determined that Title I of the Crude Oil Windfall Profit Tax Act of 1980 was unconstitutional and must be declared invalid. It rejected the Government's suggestion that it treat the Alaska exemption as "separable" and extend the Tax to the exempt portions of Alaska.[9] Recognizing that the separability issue turned on

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[7] The Fifth Amendment claim is not at issue in this Court in view of the District Court's decision in the taxpayers' favor on the issues of uniformity and separability. See J.S., App. A, 10a.

[8] The association appellees, listed in the caption of the District Court's decision (J.S., App. A, 1a), joined as plaintiffs below. The District Court found them to lack standing as plaintiffs, but ordered that they should remain as intervenors. In addition, the District Court granted motions to intervene by the States of Louisiana and Texas. See J.S., App. A, 2a.

[9] It also implicitly rejected the Government's alternative proposal that the court extend the exemption "to production in all areas similar to the Arctic Circle or located more than 75 miles from a pipeline connection." See Reply Brief for the Defendant United States of America and in Opposition to Motions for Summary Judgment, p. 10.

legislative intent, the District Court found that it was "clear that the Alaska exemption was the result of negotiations and compromise, and that the Act as it exists today would not have been passed without the invalid Alaska provision." J.S., App. A, 9a.

Since the decision below, the well-publicized drop in the world price of crude oil has dramatically changed the expected Tax revenues. Originally expected to capture about $21 billion a year, the Tax is now expected to yield only about $5 billion per year or $30 billion over the next six years. See Government's Motion to Set the Case for Oral Argument During the Present Term of Court, p. 2. The administrative costs[10] of the tax and uncertainties as to its application remain serious even today, three years after its adoption.[11] In light of these developments, it is hardly surprising that the Tax's chief sponsor, Senator Russell B. Long, has unequivocally repudiated the product of his strenuous legislative efforts, "The Windfall Profits Tax has outlived its usefulness. It is a hefty burden on production . . . . and the courts would do the nation a favor by declaring it unconstitutional." News Release from the office of Senator Russell B. Long, November 5, 1982.

SUMMARY OF ARGUMENT

I.

The Uniformity Clause of the United States Constitution states, without qualification, that "Excises shall be uniform throughout the United States." Art. I, Sec. 8, cl. 1. The Wind-

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[10] See *Report to the Secretary of the Treasury: Uncertainties About the Definition and Scope of the Property Concept May Reduce Windfall Profit Tax Revenues*, p. 14 (GAO/GGD-82-48, May 13, 1982); see also 48 Fed. Reg. 2800 (Jan. 21, 1983).

[11] There are at least eleven categories of oil and at least three categories of taxable owners. As to each taxpayer, the determination of taxable status, adjusted base price and tax rate turn upon the location of the taxpayer's oil in this matrix.

fall Profit Tax is an excise tax which is not geographically uniform throughout the United States because it exempts oil production in a geographically defined area constituting three-fourths of Alaska. The Tax is invalid since it violates both the plain language of the Constitution and this Court's clear and consistent interpretation of the Uniformity Clause as requiring geographic uniformity. *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796); *Head Money Cases*, 112 U.S. 580 (1884); *Knowlton* v. *Moore*, 178 U.S. 41 (1900).

The Government's proposed "rational basis" test is without support either in the Constitutional language or precedent, and its adoption would undermine the Uniformity Clause. This Court's decisions unequivocally state that the Uniformity Clause requires geographic uniformity. No case sustains a non-uniform excise tax because the disparity is "rational." On the contrary, the cases clearly demonstrate that the Uniformity Clause imposes a rule of *per se* invalidity. *Downes* v. *Bidwell*, 182 U.S. 244 (1901); *Railway Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457 (1982).

The Government's position rests on an elaborate word-play. It frequently imputes to appellees a notion that the Clause prohibits Congress from "taking geographic considerations into account," and then cites, as supporting its mistaken inference, decisions of this Court upholding Congress' power to do so. (Gov. Br. 9, 10, 13, 27, 32.) But appellees have always maintained, consistently with the cases, that the Clause permits Congress to take "geographic considerations into account" when framing tax legislation in terms of factors that exist in different concentrations in particular regions. Appellees have equally insisted, in accord with the cases, that the Clause denies Congress the power to take "geographic considerations into account" in the sense of framing tax legislation in terms of geographic boundaries.

The Constitution's requirement of geographic uniformity constrains Congress to address tax issues in terms of policy rather than naked political power. Congress is free to consider

any circumstance it deems relevant (such as high production costs), whether or not that circumstance is manifested disproportionately in some specific region. But by prohibiting a disparity in tax based on geographic boundaries, the Uniformity Clause forces Congress to act—and even perhaps to think—in terms of such policy factors.

There is no basis for the Government's suggestion that since the Tax applies to *some* Alaskan oil, it may, consistent with the Uniformity Clause, exempt the remaining three-fourths of Alaska. Gov. Br. 37-39. Not one of this Court's discussions of the Uniformity Clause even remotely suggests that partial non-uniformity is valid, and that violation occurs only if 100 percent of some state is treated differently from other states. Instead, the cases show that full geographic uniformity is required. *Head Money Cases*, 112 U.S. 580, 594 (1884); *Knowlton* v. *Moore*, 178 U.S. 41, 84 (1900).

The Windfall Profit Tax and the Alaska exemption were effective during the period for which refunds are claimed, and violated the Uniformity Clause throughout that period. The Government asserts that the Tax operated with "absolute geographic uniformity" during 1980, and incorrectly argues that the Tax was uniform until exempt oil was actually produced. This argument, however, ties the Government to the bizarre conclusion that on December 13, 1981, the Act could be constitutional but could become unconstitutional one day later, when exempt oil was first produced. If exempt Alaskan wells ceased operation for a week, the Tax on this theory would abruptly become lawful again for that period.

In addition, the Government's theory ignores that the Tax's non-uniformity had immediate consequences: it increased the value of the investments of appellees' competitors who held interests in the exempt areas and encouraged further development in those areas. Congress designed the Windfall Profit Tax to exclude areas known at the time to have vast oil reserves and intended specifically to encourage investment and production in those areas. This exemption rendered the Tax invalid from the moment of enactment.

II.

Congressional intent determines whether an unconstitutional statute may stand in part or must fall as a whole. The latter course is appropriate if "it is evident that the legislature would not have enacted the legislation without the invalid portion." *Zobel* v. *Williams*, 102 S. Ct. 2309, 2315 (1982), citing *Buckley* v. *Valeo*, 424 U.S. 1 (1976). In this instance, the exemption of three-fourths of Alaska was by every possible measure an integral, critical aspect of the Tax. Every seriously considered bill exempted such oil directly or indirectly; the exemption arose out of a deliberate trade-off between conflicting Congressional purposes; and adoption of the exemption in the Senate was critical to resolution of a legislative impasse that might have precluded enactment of *any* tax. A single, isolated remark on the Senate floor cannot overcome the overwhelming evidence that Congress insisted upon the exemption of Alaska and would not desire this Court to uphold the invalid Tax by extending it to exempt oil.

When a tax statute (or tax enforcement practice) is illegal simply because the legislature (or enforcing agency) has drawn a distinction that it is not legally entitled to draw, this Court's holdings have uniformly and unequivocally rejected the remedy of extending the tax. *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931). Any such remedy would disserve the Constitution by removing the incentive of prospective plaintiffs to litigate unconstitutional statutes or practices. The dictum in *Utah Power and Light* v. *Pfost*, 286 U.S. 165 (1932), relied on by the Government, involved an exemption provision that was peripheral to the legislation involved; no such label can be applied to the Alaska exemption in light of its purpose and legislative history.

The straightforward application of the general separability clause of the Internal Revenue Code, 26 U.S.C. § 7852(a), in this case is to invalidate the entire Tax. The Government's argument rests on the mistaken premise that, at worst, the Alaska exemption itself is the unconstitutional provision: it is

not. The unconstitutional provision to be severed from the Code is the Windfall Profit Tax by reason of its non-uniformity.

Congress is best able to resolve the peculiarly legislative issues that are involved in remedying the defective Tax. Any extension of the Tax will have a dramatic effect on taxpayers and on the prospects for domestic energy independence. Judicial extension of the Tax to Alaska would unfairly defeat the expectations of those who have invested hundreds of millions of dollars in the exempt area in reliance upon the exemption. Each of the Government's alternative proposed remedies would also require this Court to resolve difficult subsidiary problems, which are properly left to the legislative branch. Congress possesses broad power to enact substitute legislation, and in the absence of an express mandate to the contrary, one may safely conclude that Congress would desire to resolve these issues itself.

ARGUMENT

I. THE WINDFALL PROFIT TAX VIOLATES THE UNIFORMITY CLAUSE.

A. The Constitutional Language, the Framers' Policy Concerns and this Court's Decisions All Support the District Court's Conclusion that the Windfall Profit Tax Violates the Uniformity Clause.

The starting point for interpretation of governing language, whether statutory or constitutional, is the language itself.[12] In this case, the Uniformity Clause of the Constitution provides:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises . . .; but all Duties, Imposts and *Excises shall be uniform throughout the United States.*" Art. I, Sec. 8, cl. 1 (emphasis added).

The Windfall Profit Tax is an excise tax. Section 4986(a). As the Government admits, the Tax is not geographically uniform

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[12] See *Wright* v. *United States*, 302 U.S. 583, 587-589 (1938); *Williams* v. *United States*, 289 U.S. 553, 572-573 (1933); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917).

throughout the United States, because it exempts oil production in a geographically defined area constituting three-fourths of Alaska. It is therefore invalid under the plain language of the Constitution. Gov. Br. 20, 28.

It is apparent, from the quoted language, that the framers of the Constitution intended to prohibit Congress from drafting excise tax classifications in terms of geographic *location*. This Court has consistently adhered to that straightforward interpretation of the Constitutional language, and this reading flows naturally from the very words of the Constitution: "Uniform" clearly means in the same amount; and "throughout the United States" is a geographic reference. Consequently, when the Uniformity Clause says that "Excises shall be uniform throughout the United States," it intends that a valid excise tax apply, at the same rate, in all portions of the United States where the object of taxation may be found.[13] Thus, judged by the touchstone of Constitutional language, the test to be applied is straightforward, and the Tax in this case does not comport.

Far from contradicting the language, the framers' intent confirms the requirement of geographic uniformity. The first recorded explanation of the Clause was that of Luther Martin, delegate to the Convention from Maryland, who had originally proposed the language that evolved into the Uniformity Clause. See Gov. Br. 24. Reporting to the legislature of Maryland in 1787, Martin said:

> "[There] is a provision that all duties, imports and excises shall be uniform—*that is to be laid to the same amount on the same articles in each state.*"[14]

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[13] Consonantly, the clause does not require "intrinsic" uniformity, *i.e.*, an identical *impact* on all sections of the country (as would be true only when the subject of taxation existed in equal proportions in all regions). *Knowlton* v. *Moore*, 178 U.S. 41, 83-106 (1900).

[14] 1 Elliot's Debates on the Adoption of the Federal Constitution 369 (1888) [hereinafter cited as Elliot's Debates] (emphasis supplied as quoted in Knowlton v. Moore, 178 U.S. 41, 106 (1900)).

Martin went on to explain the limitations of the clause: because it did not require intrinsic uniformity, Congress would be free to select objects of taxation that were rare in some states but abundant in others. *Id.*

The Court itself first interpreted the uniformity provisions shortly after adoption of the Constitution. In *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171 (1796), Justice Paterson, who had served as a delegate to the Constitutional Convention from New Jersey, considered the Clause and explained the Court's preference for classifying taxes so that they would be covered by the requirement of uniformity rather than that of apportionment.[15] He emphasized that, in contrast to the "endless valuations and assessments" necessary for apportionment,

> "[t]he rule of uniformity . . . implies certainty. . . . The truth is, that *the articles taxed in one state should be taxed in another;* in this way the spirit of jealousy is appeased, and tranquility preserved; *in this way the pressure on industry will be equal in the several states*, and the relation between the different objects of taxation duly preserved." 3 U.S. (3 Dall.) at 180 (emphasis added).

In the *Head Money Cases*, 112 U.S. 580 (1884), the Court articulated its classic interpretation of the Uniformity Clause: A tax, it said, complies with the Uniformity Clause only if "it operates with the same force and effect *in every place* where the subject of it is found." 112 U.S. at 594 (emphasis added). Similarly, in the Court's most complete discussion of the clause, *Knowlton* v. *Moore*, 178 U.S. 41 (1900), it again concluded that the Clause refers "purely to a geographical uniformity." 178 U.S. at 96. In its words, the Uniformity Clause requires

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[15] Taxpayer plaintiff claimed that a tax on carriages was "direct" and ought therefore to have been apportioned pursuant to Art. I, § 9, cl. 4. Instead, the Court held the tax to be indirect and governed by the uniformity requirement of Art. I, § 8, cl. 1.

> "that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that *wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate.*" *Id.* at 84 (emphasis added).

In subsequent cases, this Court has consistently held that the uniformity required is geographic uniformity. In *Florida* v. *Mellon*, 273 U.S. 12, 17 (1927), the Court stated that the Uniformity Clause requires "that the law shall be uniform in the sense that by its provisions *the rule of liability shall be the same in all parts* of the United States," (emphasis added), and in *LaBelle Iron Works* v. *United States*, 256 U.S. 377, 392 (1921), the Court construed the Clause as requiring "territorial" uniformity. See also *Fernandez* v. *Wiener*, 326 U.S. 340, 359-61 (1945).

The Constitution's requirement of geographic uniformity means that, in framing excise tax legislation, Congress will consider the issues in terms of policy rather than naked political power. Congress is free to consider any circumstance it deems relevant (such as high production costs), whether or not that circumstance is manifested disproportionately in some specific region. But by prohibiting a disparity in tax based on geographic boundaries, the Uniformity Clause forces Congress to act—and even perhaps to think—in terms of such policy factors, and not in terms of purely political, regional factors.

The present facts amply illustrate the wisdom of the Clause. Thus, to the extent that the Alaska exemption arises out of Congressional concern over the Tax's disincentive to oil production in adverse climates, then after invalidation of the Tax, Congress may wish to provide general exemptions for oil produced in areas that experience specified climatic conditions. Such a "cold weather" exemption, however, would in all likelihood benefit states other than Alaska, including Wyoming and other mountain states. Even if a "cold weather" exemption happened to affect only portions of Alaska, treatment

of the issue in that form would naturally invite Congress to consider whether *other* factors accounting for high costs—such as production from offshore wells or from great depths—should also enjoy special relief. Differences in transportation costs, which the Government also invokes to support the exception, could also be—and indeed are—reflected in the Tax.[16]

There is thus nothing to the Government claim that enforcement of the Uniformity Clause according to the traditional understanding would "disabl[e] the Congress and the President from dealing with great national concerns, such as energy development and federal revenues, in a discerning, nondiscriminatory way. . . ." Gov. Br. 30. As just explained, this very tax illustrates how readily Congress could achieve such legitimate ends—without impinging on the principle of uniformity—by providing exceptions framed in terms of severe climate, high production costs, or other relevant functional variables. For 200 years Congress has managed to comply with the requirement of geographic uniformity; the Government offers no basis for a belief that the Clause has suddenly become an obstruction to sound tax legislation.

The Government repeatedly suggests that appellees have interpreted the Uniformity Clause to prohibit Congress from taking "geographical considerations into account." Gov. Br. 9, 10, 13, 27, 31. Appellees have never suggested any such thing. Where factors relevant to the purposes of tax legislation are concentrated in a specific geographic area (such as, for example, severe climate or any circumstance by virtue of which

[16] The present tax formula already takes account of the higher cost of transporting Alaskan oil. The price paid for such oil at the wellhead is normally less than the mainland price, reflecting the added transportation costs that the purchaser will incur (*e.g.*, if mainland oil is priced at $28 and the transportation cost from Alaska is $8.00, Alaskan oil will sell at the wellhead for $20). Since the wellhead price of Alaskan oil is therefore less, so is the tax paid, as it is levied on the wellhead price (less a fixed statutory amount, the adjusted base price). See p. 1, n.1, *supra*.

the tax would especially tend to discourage the production of oil), Congress is, of course, entirely free to provide exemptions framed in terms of those *factors*. All that the Uniformity Clause prohibits is its delineating the exemption in terms of geographic boundaries.

The Government correctly notes that until the decision of the District Court in this case no tax statute had ever been held to violate the Uniformity Clause. Gov. Br. 8, 13. The Government seems to regard that fact as supporting its proposal that the Court supplant its 200-year-old rule with the Government's complex alternative. Quite the contrary, the 200 years of experience suggest the wisdom of continued adherence to the established rule. This is a constitutional success story; the Clause need not be rewritten.

B. The Government's Proposed "Rational Basis" Test Is Without Support and Would Undermine the Uniformity Clause; Nor Is There Any Basis for Suggesting That a Majority-Approved Preference Is a Valid Exception.

1. There Is No "Rational Basis" Exception.

The unqualified language of the Uniformity Clause, and its consistent interpretation by this Court, establish that "wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate." *Knowlton* v. *Moore*, 178 U.S. 41, 84 (1900). Despite this clear and consistent interpretation, the Government suggests that geographically non-uniform excise taxes should be upheld if the geographic disparity is supported by a "rational basis" or "rational considerations" or "reasonable basis." Gov. Br. 27, 31, 32, 33.

The cases unequivocally and without qualification state that the Clause requires geographic uniformity. None sustains a non-uniform excise tax because the disparity is "rational." On the contrary, *Downes* v. *Bidwell*, 182 U.S. 244 (1901), clearly demonstrates the Court's view that the Uniformity Clause imposes a rule of *per se* invalidity.

After the United States acquired Puerto Rico in the Spanish-American War, Congress sought to establish and finance civil government in Puerto Rico. In the Foraker Act, 31 Stat. 77-78, ch. 191 (1900), it imposed a special duty of 15 percent on all goods entering the United States from Puerto Rico or entering Puerto Rico from the United States, and earmarked the proceeds for the task of governing the island. This different treatment was not merely "rational" but was the product of "careful" consideration by Congress. *Id.* at 284.[17] But in upholding the tax, the Court in *Downes* did not in any respect rely on the justifications considered by Congress. Instead, it expressly stated that the tax *must fall* unless it could be established that for purposes of the Uniformity Clause Puerto Rico was not part of the United States:

> "If Porto Rico [sic] be a part of the United States, the Foraker Act imposing duties upon its products is unconstitutional, not only by reason of a violation of the uniformity clause, but because by section 9 'vessels bound from one State' cannot 'be obliged to enter, clear, or pay duties to another.'" *Id.* at 249.

The Court then proceeded to sustain the tax on the ground that a territory such as Puerto Rico was not part of the United States for purposes of the Uniformity Clause. This analysis required approximately 40 pages in the United States Reports. See 182 U.S. at 247-87. A concurring opinion devoted another 57 pages to the same issue. See 182 U.S. at 287-344. And dissenters devoted another 44 pages to the same issue. See 182 U.S. at 347-91. Yet all Justices were fully aware of the special factors which were considered by Congress and which amply justified the use of a special tax system for Puerto Rico. Not a single Justice argued that those differentiating factors would sustain the tax. Obviously, the Justices would not have

[17] As the Supreme Court noted, Puerto Rico had had no property tax; the federal internal revenue tax was far heavier than any to which the island had been subjected under Spanish rule; and the island's former principal source of revenue had been duties. *Id.*

written virtual treatises on the status of territories had they thought that factors supporting special treatment of Puerto Rico—factors clearly articulated in a single page (182 U.S. at 284)—could save the tax.

Only recently, in *Railway Labor Executives Ass'n* v. *Gibbons*, 455 U.S. 457 (1982), this Court flatly rejected a claim—under the corresponding uniformity provision of the Bankruptcy Clause[18]—identical to the Government's "rational basis" theory in this case. The Court struck down the Rock Island Transition and Employee Assistance Act ("RITA"), which had sought to establish special bankruptcy rules for the Chicago, Rock Island and Pacific Railway Company (the "Rock Island"). The Court in *Railway Labor Executives'* made clear that the rule applied was one of *per se* invalidity, for it held that a bankruptcy law applying to only one debtor was *necessarily* invalid, without regard to possible justifications. "A bankruptcy law, such as RITA, confined as it is to the affairs of one named debtor can hardly be considered uniform." *Id.* at 473. The majority also noted, in words equally applicable here, that

> "[t]he issue is not whether Congress has discriminated against the Rock Island estate, but whether RITA's employee protection provisions are uniform bankruptcy laws. *The uniformity requirement of the Bankruptcy Clause is not an Equal Protection Clause for bankrupts.*" *Id.* at 470 n.11 (emphasis added).

In arguing for "rational" non-uniformity, the Government relies heavily on a mistaken interpretation of the *Head Money Cases*, 112 U.S. 580 (1884). Congress had levied a charge on alien passengers entering the United States by vessel, and the court upheld the charge against a challenge under the Uniformity Clause. Writing for the court, Justice Miller explained that a tax was uniform within the meaning of the Clause only "when it operates with the same force and effect in every place

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[18] Article I, Sec. 8, cl. 4 of the Constitution empowers Congress "[t]o establish . . . uniform laws on the subject of Bankruptcies throughout the United States."

where the subject of it is found." *Id.* at 594. He also observed that the charge in question applied "to all *ports* alike." *Id.* at 595. The contrast with the present case could not be sharper. The Windfall Profit Tax does *not* apply to every "oil well alike," or to every "oil well with high production costs alike." It applies to newly discovered oil in 49 states and one-fourth of Alaska, and not at all to such oil in the exempt three-fourths of Alaska.

The Government further argues that the charge in *Head Money* "could apply only in states having sea ports (a matter necessarily determined by consideration of their geography.")." Gov. Br. 31. Appellees, however, have never questioned that Congress may use functional tax classifications that result in different consequences for different localities and virtually every concept Congress might use—oil, vessels, port, income, cold weather—would affect different regions differently. *Head Money* and later court decisions confirm that the Uniformity Clause does not require "intrinsic uniformity" (112 U.S. at 594-95). Here, however, Congress has not spoken in such terms (*e.g.*, exempting oil produced where specific climate conditions are present) but has framed the tax in terms of express geographical boundaries. This the Uniformity Clause forbids.[19]

The Government's "rational basis" exception also finds no support in the *3R Act Cases*, 419 U.S. 102 (1974). As this Court

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[19] Lest there be any doubt of Justice Miller's meaning in the *Head Money Cases*, we may look to his lectures on the Constitution, delivered during the winter of 1889 and early spring of 1890. In the lectures, published posthumously as *Lectures on the Constitution of the United States* (1891), Justice Miller said (*id.* at 240):

> "They [taxes covered by the Uniformity Clause] are not required to be uniform as between the different articles that are taxed, but uniform as between the different places and different States. Whiskey, for instance, shall not be taxed any higher in the State of Illinois, or Kentucky, where so much of that article is produced, than it is in Pennsylvania. The tax must be uniform on the particular article; and it is uniform within the meaning of the constitutional requirement if it is made to bear the same percentage over all the United States."

explained in *Railway Labor Executives'*, the *3R Act Cases* represented a situation in which the requirement of geographic uniformity was met fully in substance, if not in form:

> "Since no railroad reorganization proceeding was then pending outside of the region defined by the Regional Railroad Reorganization Act (3R Act), 87 Stat. 985, 45 U.S.C. § 701 *et seq.* the Act in *fact* operated uniformly upon all railroads then in bankruptcy proceedings." 455 U.S. at 469-70 (emphasis added).

To underscore the point, the Court continued: "Unlike the situation in the *3R Act Cases*, there are other railroads that are currently in reorganization proceedings, but these railroads are not affected by the employee protection provision of RITA." *Id.* at 470. Here, too, unlike the situation in the *3R Act Cases*, there is other newly discovered oil (outside Alaska), but that oil does *not* enjoy the special exemption accorded Alaskan oil.[20]

The Government finally seeks to invoke Justice Story in support of its "rational basis" theory. Gov. Br. 26-27. Justice Story wrote:

> "The answer to the * * * [uniformity requirement] may be given in a few words. It was to cut off all undue preferences of one state over another, in the regulation of subjects affecting their common interests. Unless duties, imposts and excises were uniform, the grossest and most oppressive inequalities vitally affecting the pursuits and employments of the people of different states might exist." J. Story, *Commentaries on the Constitution of the United States* Sec. 957, at 673 (2d ed. 1851).

Justice Story here was clearly seeking to *explain* the Uniformity Clause, not *construe* it. Without the Uniformity

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[20] The statute at issue in the *3R Act Cases* affected railroads in reorganization in the specified region during a 180-day period starting with the statute's effective date. 419 U.S. 102, 159-160 (1974). By the time of decision, the period had passed, establishing conclusively that there could never be any railroads outside the specified region to which the statute could have applied (but for its nominal geographic restriction).

Clause, he argued, "undue preferences" and "the grossest and most oppressive inequalities" might exist. In no way did he read the Clause as inviting the courts to review tax legislation for "oppression" or "undue" favoritism; he simply argued, as do appellees, that without the uniformity requirement the risk of such oppression is much increased. The Government, by contrast, confuses the purpose of the clause with the means adopted for achieving that purpose. By that sort of reasoning, one might equally conclude that, since the purpose of the requirement that a president be at least 35 years of age (Art. II, Sec. 1, cl. 5) is to assure adequate maturity, an exceptionally mature 30-year-old should be eligible. Brightline rules have their purposes, but that is hardly a reason to destroy their brightline character.

2. There Is No "Majority Preference" Exception.

At various points in the District Court the Government seemed to be urging a different proposed exception to the uniformity requirement. The Government argued there that the only "danger" sought to be averted by the Uniformity Clause was "a tax falling on a state or states imposed by a majority of other states." Brief for the Defendant in Support of Its Motion for Summary Judgment, at 10. Although no longer explicitly argued, the theory finds an echo in the Government's present brief. Thus, the Government argues that review under the Uniformity Clause should be "quite limited" when the tax provisions involve discrimination "against 49 states in favor of one." Gov. Br. 9, 39.

The theory is consistent with the Government's general effort to transform the Uniformity Clause into a diluted species of equal protection. However, the Government's argument founders at the outset on its own concession that the Uniformity Clause and the Port Preference Clause (Art. I, Sec. 9, cl. 6) are aimed at similar evils (Gov. Br. 23-27), for the Government now concedes that the Port Preference Clause was intended to prevent legislation "favoring"—as well as disfavoring—the ports of certain states (Gov. Br. 24).

Further, the alleged distinction between preference and prejudice is far more slippery than the Government suggests. In this very case, the Tax is—in fact—one imposed primarily upon a small minority of states that produces most domestic oil by the majority that produces little or none.[21] Alaska was a roadblock to enactment of the Tax, and the majority removed this roadblock by exempting oil from most of Alaska. See pp. 31-33, *infra*. The reality is very far from "discriminating against 49 states in favor of one." Gov. Br. 9, 39. If discrimination by a majority against a minority were a precondition to invoking the Clause, this Tax would still be invalid.

In any event, neither the Uniformity Clause nor the governing precedents distinguish between preferential non-uniformity and prejudicial uniformity. They do not permit non-uniformity where preference is involved, nor do they contemplate a lesser or "quite limited" measure of scrutiny in such a case. Compare Gov. Br. 9. Even if scrutiny were "quite limited," the Tax in this case is non-uniform by any geographic standard, so the Government's argument for "limited" review is meaningless, save as a backhanded way of arguing again for a rationality exception.

* * * * *

For the Court now to jettison the established understanding would only invite Congressional testing of the new line. The Court would ultimately have to (1) render the Clause superfluous (by equating it with the "rational basis" test applied to all economic legislation under the Equal Protection Clause) or (2) embark on a process of case-by-case review of each new

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[21] There are 17 states with no oil production and another 27 with such trivial production that their shares aggregate a mere 15.3% of total American production (measured by wellhead value). The remaining 84.7% of production is concentrated in just six states (Texas, Louisiana, California, Oklahoma, Wyoming and Alaska). See Independent Petroleum Association of America, The Oil Producing Industry in Your State (1982 Edition), at p. 118.

geographically non-uniform tax to see whether it contained enough of the evils feared by the framers to justify invalidation—however those evils might be measured. Adherence to plain and long-established principle, however, will preserve the requirement's advantageous effects without in any way obstructing Congressional adoption of sound tax policy.

C. Given the Requirement of Geographic Uniformity, the Tax Is Plainly Unconstitutional.

1. Application of the Tax to One Fourth of Alaska Does Not Render the Tax "Uniform."

The Government appears to suggest that since the Tax falls upon some Alaskan oil, at high rates, it may, consistent with the Uniformity Clause, exempt the remaining three-fourths of Alaska. Gov. Br. 37-39. In fact, the existing Tax seeks to mitigate the impact on taxed Alaskan oil in several ways.[22] Even if it did not do so, the proper solution would be to revise the tax in permissible ways to take account of climate and transportation costs. The present lack of constitutional uniformity cannot be excused by arguing that the tax is also

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[22] In addition to reducing the Tax as transportation costs increase (see p. 13, n.16, *supra*), the statute contained a so-called TAPS adjustment (which was subsequently repealed by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, Sec. 284 (1982)) which provided a special benefit for Sadlerochit oil not available for oil produced in any other state. Normally, a decrease in transportation cost increased the wellhead price and therefore the tax owed. However, the TAPS adjustment provided that where the pipeline transportation cost in Alaska fell below a set figure, any further decrease would no longer increase the amount of tax owed for the Alaskan oil. The TAPS adjustment was another example of non-uniformity which favored Alaska. The Senate Finance Committee, in 1982, recognized that the "TAPS adjustment provid[ed] producers of Sadlerochit oil a benefit given to no other oil producers," and recommended repeal of the TAPS adjustment. S. Rep. No. 97-494, 97th Cong., 1st Sess. 346 (1982).

unreasonably burdensome in some other respect. *See Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, No. 81-1839, slip op. at 11-12, 17 (U.S., March 29, 1983).

The sole support adduced in support of the Government's interpretation comes in the form of decisions construing another provision of the Constitution, the Port Preference Clause:

> "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." Art. I, Sec. 9, cl. 6.

Not one of this Court's discussions of the Uniformity Clause hints in the slightest way at any idea that partial non-uniformity is valid, that violation occurs only if 100 percent of some state is treated differently from its fellows. Instead, the cases show that full geographic uniformity is required. The *Head Money Cases*, 112 U.S. 580, 594 (1884) (uniform tax must operate "with the same force and effect in *every place* where the subject of it is found"); *Knowlton* v. *Moore*, 178 U.S. 41, 84 (1900) ("wherever a subject is taxed anywhere, the same must be taxed everwhere throughout the United States, and at the same rate"); *Florida* v. *Mellon*, 273 U.S. 12, 17 (1927) ("the rule of liability shall be the same *in all parts* of the United States") (emphasis supplied in all above quotes).

In contrast with this understanding of the Uniformity Clause, the prohibition against port preferences has always been understood to allow Congress to provide for the improvement of particular navigational facilities, such as rivers and harbors, lighthouses, and bridges. The first two Congresses alone, for instance, provided in four separate enactments for individual port improvements.[23] In light of the early origins and

[23] *E.g.*, 1 Stat. 53-54 (Act of August 7, 1789); 1 Stat. 246 (Act of April 2, 1792); 1 Stat. 251 (Act of April 12, 1792, authorizing beacons at Charleston, S.C. and other sites); 1 Stat. 251 (Act of April 12, 1792, authorizing lighthouse at Montauk Point).

constant recurrence of this practice[24] it is hardly surprising that in *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855), the Court found no Constitutional violation in a similar Congressional approval of a specific bridge.[25] However, the Court has stated that under the Port Preference Clause "positive" commercial regulation must be "common and equal in all the ports of the several States." *Id.* at 435.

Until this lawsuit, no one interpreting the Uniformity Clause ever suggested that its structure could be evaded merely by treating some modest fraction of a favored state the same as the others. Congressional practice has for 200 years been in full conformity with the oft-stated meaning of the Uniformity Clause. The Government suggests no basis in precedent or policy under that Clause for the abandonment of this universal understanding.

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[24] This Court has typically deferred in constitutional interpretation to constructions by Congress contemporaneous with the adoption of the Constitution. See, *e.g.*, *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 315 (1851); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 351-52 (1816).

[25] In *Commission* v. *Texas & N.O.R. Co.*, 284 U.S. 125 (1931), also cited by the Government, the Interstate Commerce Commission had set rates that provided for a charge of eight cents per ton for ferrying such of the traffic as crossed the Mississippi. The Court rejected an attack on these rates, based on the Port Preference Clause, merely because they might "incidentally result to the disadvantage" of ports in one state compared to those of another, *id.* at 131. If ICC rates were invalid merely because they reflected the natural geographic disadvantage of Louisiana ports compared to ones not separated from the market by a wide river, a vast deal of legitimate ratemaking would fail. Moreover, the framers recognized from the outset that the Port Preference Clause allowed Congress to designate particular ports as ports of entry without so designating all comparable ports. See 1 Elliot's Debates 375-76. No similar latitude has ever (until now) been suggested with respect to taxes governed by the Uniformity Clause. Compare *id.* at 369.

2. The Alaska Exemption Was Effective During the Periods for Which Refunds Are Claimed, and the Act Violated the Uniformity Clause Throughout That Period.

The Government repeatedly asserts that during the periods for which refund claims were made (March 1 through December 1, 1980), the tax operated with "absolute geographic uniformity." Gov. Br. at 40, 41, 42. Based on this incorrect characterization, the Government asks this Court to draw the incorrect conclusion that the tax was uniform during the period over which the district court had jurisdiction.[26]

The Government attempts to analogize the Alaskan exemption to an exemption for oil produced in Hawaii (where it asserts oil has never been found) and argues that taxes subject to such exemptions are uniform until exempt oil has actually been produced. Thus the Government ties itself to the odd view that on December 13, 1981, the Act could be constitutional but could become unconstitutional on December 14, 1981, when exempt oil was first produced. See Kye Trout Affidavit. J.A. 52-53. If exempt Alaskan wells ceased operation for a week, the Tax on this theory would abruptly become lawful for that period.

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[26] After having moved the Court to expedite this case, the Government incongruously suggests that the case is not ripe. However, because oil production in the exempt areas of Alaska was imminent during the periods for which appellees sought refunds and in fact began well before the district court's decision, this case does not represent the sort of abstract disagreement that the ripeness requirement was designed to remove from judicial consideration. See *3R Act Cases*, 419 U.S. 102, 139-40 (1974). By the time of adjudication the tax had been imposed and the exemption had been enforced. The effect of the challenged statute ha[d] been "felt in a concrete way." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967). Nothing in the case would have become or will now become more clear-cut by postponing resolution of the uniformity issue. See *3R Act Cases*, 419 U.S. at 143; *City Bank Co.* v. *Schnader*, 291 U.S. 24, 34 (1934).

Apart from its premise that the constitutionality of a tax may vary from day to day, the Government's theory ignores the effects of the Alaska exemption in the real world throughout the period for which refunds are sought. During this period, appellees paid onerous taxes pursuant to a statute that on its face unconstitutionally distinguished between their oil production and any that might take place in the exempt areas. Legally, producers in exempt areas were entitled to the benefit of the exemption from the day the Act was effective; they were free to act with the assurance that any oil produced by them in the exempt area would be free of tax. Consequently, the Act's non-uniformity had immediate consequences: it increased the value of the investments of appellees' competitors who held interests in the exempt areas and encouraged further investment in production in those areas.[27] By increasing the anticipated return on investment in the exempt area relative to investments elsewhere, the Tax gave companies investing in the exempt area an immediate competitive advantage in the quest for capital. If more in the way of practical effect were required,[28] cases resolved on the basis of imminent constitutional injury could never support a declaration of *present* unconstitutionality. But such cases, of course, are not uncommon.[29]

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[27] Atlantic Richfield Company invested almost $700 million in developing the Kaparuk River field and acquired new interests in the exempt areas at a cost of some $36 million. The company states that since the enactment of the Windfall Profit Tax it "has conducted extensive exploration activities" and "has increased the scope of its . . . investments and accelerated their timing in reliance on the 'Alaskan oil' exception." Brief of *Amicus Curiae*, Atlantic Richfield Company, at 2.

[28] The *3R Act Cases*, 419 U.S. 102 (1974), do not suggest that more is required. Given the terms of the statute and the facts existing at the time it became effective, the 3R Act could *never* operate non-uniformly. See p. 18 n.20, *supra*.

[29] See, *e.g.*, *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 600 (1923); *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 288, 310, 311 (1936); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535-36 (1925). See also

(footnote continues)

If, as the Government whimsically suggests, the exemption were for oil produced in Hawaii, the same reasoning would apply. Realistically the reason for enacting such an exemption would be to encourage oil exploration in a previously unproductive area, and the exemption would affect the incentives and planning of oil producers. Alternatively, if it is assumed that no barrel of oil could ever be produced in Hawaii during the taxing period, the exemption might be viewed as ineffective surplusage, like the geographic terms in the *3R Act Cases*. But this only serves to emphasize how different is the exemption involved in this case. The Alaskan exemption was defined to include areas known at the time to have vast oil reserves and was so defined specifically to encourage investment and production in those areas. Its presence rendered the Tax invalid from the moment of enactment.[30]

(footnote continued)

Sully v. *American National Bank*, 178 U.S. 289, 300 (1900) (claim of unconstitutional discrimination between resident and nonresident creditors does not depend on whether any resident creditors were actually favored by operation of statute).

[30] The Government hints at an argument that if the "subject" of the Tax is the enjoyment of a "windfall profit" by the owner of an economic interest in oil, wherever those owners may be located, there is no geographic nonuniformity violative of the Constitution (Gov. Br. 28). The Government's implicit argument, if accepted, would completely eliminate the uniformity requirement. Assuming, for example, that some owners of Florida orange groves are domiciled elsewhere, Congress would be free to levy an excise tax on production of Florida oranges, exempting orange production in every other state.

II. THE WINDFALL PROFIT TAX, NOT THE EXEMPTION, IS UNCONSTITUTIONAL, AND JUDICIAL EXTENSION OF THE TAX TO ALASKA IS AN IMPROVIDENT AND IMPERMISSIBLE REMEDY.

A. The Alaska Exemption Was of Central Concern to Congress and Was Essential to Passage of the Tax; Extension of the Tax to Alaska Would Clearly Frustrate Congressional Intent.

1. Congress Regarded the Alaska Exemption As an Essential Part of the Balance It Sought to Achieve.

The District Court concluded that it was "clear that the Alaska exemption was the result of negotiations and compromise, and that the Act as it exists today would not have been passed without the invalid Alaska provision." J.S., App. A, 9a. In light of that finding as to Congressional intent, it refused the Government's invitation to extend the Tax to Alaska and instead invalidated the Tax. The District Court's reading of the Congressional intent was clearly correct. Judicial extension of the Tax to the exempt portions of Alaska would run counter to Congress's explicit, resolute decision in favor of exemption.

The general principle governing "separability" is not controversial: Congressional intent controls. Extension of the Tax to the exempt portions of Alaska is not appropriate if "it is evident that the legislature would not have enacted the legislation without the invalid portion."[31] Where Congress has not ex-

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[31] *Zobel* v. *Williams*, 102 S. Ct. 2309, 2315 (1982), citing *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976); *United States* v. *Jackson*, 390 U.S. 570, 585 (1968); *Champlin Rfg. Co.* v. *Commission*, 286 U.S. 210, 234 (1932). There is nothing outmoded about this analysis, as the Government implies. Gov. Br. 48. The rule referred to in *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971), as being one that this Court had "long since firmly rejected" (Gov. Br. 48-49), was in fact a rule wholly irrelevant to the present case, namely, the rule that a party challenging the unconstitutionality of a statute could prevail merely by showing that some *other* application of it that was unconstitutional. See *Griffin* v. *Breckenridge*, *supra*, at 104, and *United States* v. *Raines*, 362 U.S. 17, 20-24 (1960), relied on by the Court in *Griffin*.

pressed itself directly on the matter, Congressional intent can be inferred primarily from evidence as to the importance Congress attached to the invalid provision. Where the portion "is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative." *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 565 (1902).[32]

The Alaska exemption was by every possible measure an integral, critical aspect of the Tax. Every seriously considered bill reflected the President's and Congress's determination to exempt vast quantities of Alaskan oil production. President Carter's proposals to Congress called for complete exemption of all North Slope oil and any other oil transported through the Trans-Alaska Pipeline System.[33] The House Ways and Means Committee bill taxed newly discovered oil but exempted Alaskan oil produced north of the Arctic Circle (except for the Sadlerochit reserves already in production), and the Senate Finance Committee bill exempted all newly discovered oil,[34] thereby sheltering from the Tax all the oil that benefits from the Alaska exemption under the Tax ultimately adopted. The final Senate bill, like its House counterpart, taxed newly discovered oil but exempted Alaskan oil from North of the Arctic Circle (other than Sadlerochit oil).[35] Finally, the bill reported out of conference retained the exemption provided for by House and Senate, but expanded it to include oil produced south of the Arctic Circle but north of the divides of the Alaska

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[32] *Tigner* v. *Texas*, 310 U.S. 141 (1940), overruled *Connolly* on the underlying Constitutional issue but not on the analysis of separability.

[33] H. Doc. 96-107, 96th Cong., 1st Sess., *Windfall Profits Tax and Energy Security Trust Fund: Message from the President of the United States* 3 (1979).

[34] H. Rep. No. 304, 96th Cong., 1st Sess. 30 (1979); S. Rep. No. 394, 96th Cong., 1st Sess. 42-43 (1979).

[35] See 125 Cong. Rec. S18564-67 (daily ed. December 14, 1979); H. Rep. No. 96-817, 96th Cong., 2d Sess. 102 (1980).

and Aleutian Ranges and more than 75 miles from the TAPS system. This uninterrupted adherence to the Alaskan exemption is clear evidence of its importance to Congress.[36]

The Alaska exemption also played a key role in reconciling conflicting Congressional objectives. While one Congressional goal was to generate tax revenues and to finance energy conservation and low-income energy assistance, another was to encourage domestic energy production and reduce dependence upon imported oil. The legislative history is replete with references to the balance struck in the Act among these competing goals.[37] The Alaskan exemption was seen by Congress as being an integral part of that balance. The House Report on an earlier version of the bill explained:

> "To provide the appropriate production incentives, the bill provides special treatment for newly discovered oil, certain Alaskan oil, and incremental oil production from qualified tertiary recovery projects . . . .
>
> [A] relatively heavy tax on tier one and tier two oil, along with the *more lenient treatment of* newly discovered, *Alaskan* and tertiary *oil, strikes the appropriate balance between revenue needs and production incentives.*" H.R. Rep. No. 304, 96th Cong., 1st Sess. 14 (1979) (emphasis added).[38]

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[36] Compare *Consumers Energy Council* v. *Federal Energy Regulatory Commission*, 673 F.2d 425, 440-45 (D.C. Cir. 1982) (fact that the legislative veto of Title II of the Natural Gas Policy Act was added only in conference, and not even mentioned in the conference report, deemed powerful evidence that Congress would have intended it to be severed).

[37] See, *e.g.*, 126 Cong. Rec. H1834 (daily ed. Mar. 13, 1980) (remarks of Rep. Ullman); 126 Cong. Rec. S2630 (daily ed. Mar. 19, 1980) (remarks of Sen. Gravel); 126 Cong. Rec. S2855 (daily ed. Mar. 24, 1980) (remarks of Sen. Baucus).

[38] The Senate Report also emphasized that "in designing the tax, the committee attempted to reduce or eliminate the tax burden on those types of oil the production of which is likely to be relatively sensitive to changes in tax rates or prices." S. Rep. No. 394, 96th

(footnote continues)

The Joint Explanatory Statement of the Conference Committee reflects the same concern:

> "The exemption of Alaskan oil production for the designated locations reflects the concern of the conferees that taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions." H. Rep. No. 817, 96th Cong., 2d Sess. 103 (1980).

The debate in both Houses echoed the same concerns. It was pointed out that Alaska supplied approximately 15 percent of domestic oil currently being produced (roughly 1 out of 6 barrels produced domestically) and about 800 million barrels of known reserves still remained in the west (exempt) end of the Sadlerochit Reservoir.[39] In addition to known reserves in Prudhoe Bay, Senate discussions noted the discovered but as yet unproven reserves in the Kuparuk and Lisburne fields. 125 Cong. Rec. S17715 (daily ed. Dec. 4, 1979) (remarks of Sen. Bradley). In general, Congress believed that there was a tremendous amount of oil yet to be produced in Alaska and that this oil should be exempt from the Tax.[40]

The Government concedes the importance of price in generating exploration for the production of Alaskan oil. It

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Cong., 1st Sess. 2 (1979). The Committee went on to explain that its exemptions, including newly discovered oil (which encompassed all the oil that benefits from the Alaska exemption under the Tax as adopted), were intended to "encourage greater oil production." *Id.*

[39] 126 Cong. Rec. H1842-43 (daily ed. Mar. 13, 1980) (remarks of Rep. Young); 125 Cong. Rec. S17666 (daily ed. Dec. 3, 1979) (remarks of Sen. Stevens). Current United States government estimates of the reserves in the exempt portions of the Sadlerochit Reservoir (*i.e.*, the portion of that reservoir outside Prudhoe Bay) now greatly exceed the figure used by Senator Stevens. See p. 3 n.4, *supra*.

[40] See 125 Cong. Rec. S18137 (daily ed. Dec. 10, 1979) (remarks of Sen. Long); 126 Cong. Rec. S2772 (daily ed. Mar. 20, 1980) (remarks of Sen. Bellmon).

correctly notes that "a relatively small reduction in the price of oil during 1982 led to a slowdown in development in the Kuparuk River field." Gov. Br. 19-20 n.26. An increase in tax, reducing the after-tax return, would have an identical impact. Clearly, therefore, Congress would not have been satisfied with a Windfall Profit Tax unchanged except for deletion of the Alaska exemption. This was recognized even by Senator Long, then but not now (see p. 5, *supra*) a major supporter of the Tax. In a caveat that the Government relegates to a footnote (Gov. Br. 46 n.41), he admitted that absent the Alaskan exemption, some other relief for high cost oil would have to be devised. See p. 34, *infra*.

The Senate decision to exempt Alaskan oil came as part of a unified package, the other part of which was extension of the Tax to newly discovered oil in 49 states. See 125 Cong. Rec. S18564-67 (daily ed. Dec. 14, 1979) and text *infra*. Adoption of the package played a vital role in resolution of a stalemate that had developed between those who sought to extend the Tax and those opposed either to the Tax as a whole or to its extension to new oil. The package arrangement constituted the essential compromise that ended the stalemate and paved the way for adoption of the Tax.

Debate on the Tax bill had begun on November 15, 1979, but, starting as early as December 3, 1979, the official record of the Senate debate contains allusions to intensive behind-the-scenes negotiations between the contending forces.[41] To maintain the pressure on the negotiators, the Majority Leader, Senator Byrd of West Virginia, frequently kept the Senate in session into the evening. Allusions of threatened or actual delaying actions were frequent, as was evidence of such action.[42] Senator Long indicated that the committed resistance

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[41] See, *e.g.*, 125 Cong. Rec. at S17688 (daily ed. Dec. 3, 1979) (remarks of Sen. Byrd); S17707 (daily ed. Dec. 4, 1979) (remarks of Sen. Byrd) and S18509 (daily ed. Dec. 14, 1979) (remarks of Sen. Boschwitz).

[42] See, *e.g.*, 125 Cong. Rec. at S17707 (daily ed. Dec. 4, 1979) (Sen. Stevens, indicating readiness to withhold otherwise appropriate

(footnote continues)

of a single Senator might jeopardize passage of *any* bill. 125 Cong. Rec. S18041 (daily ed. Dec. 7, 1979). Cloture votes were threatened, then delayed.[43] Finally, on December 14, 1979, the logjam broke. The major participants in the behind-the-scenes negotiations arrived at a compromise, pursuant to which the Senate extended the Tax to "newly discovered oil (other than newly discovered oil produced north of the Arctic Circle)."[44]

Throughout the extensive negotiations Senator Stevens of Alaska, the Acting Minority Leader, played a significant role.[45] In expressing his reluctant approval of the compromise measure, he stated his flat opposition to any further amendment that would increase the tax on Alaskan oil. 125 Cong. Rec. S18565 (daily ed. Dec. 14, 1979). The timing, the key role of

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(footnote continued)
unanimous consents); S17707-08 (daily ed. Dec. 4, 1979) (Sen. Byrd, asserting desire to avoid filibuster); S17805 (daily ed. Dec. 5, 1979) (Sen. Dole, threatening a "long debate" if proposed amendment restricting percentage depletion were passed); S18039-42 and S18050-51 (daily ed. Dec. 7, 1979) (allusions by Senators Byrd, Long and Dole to the problem of non-germane amendments); S17932, S18136 (daily eds. Dec. 6, 1979, Dec. 10, 1979) (tabling or defeat of such amendments).

[43] See 125 Cong. Rec. S18039-42, S18052 (daily ed. Dec. 7, 1979) (remarks of Senators Byrd, Long, and Dole). Those seeking to limit the drastic nature of the proposed tax bill expressly suggested that their cooperation on the Chrysler bail-out was to some extent conditional on their receiving some cooperation on the Windfall Profit Tax. See 125 Cong. Rec. S18040-41 (daily ed. Dec. 7, 1979) (remarks of Sen. Tower).

[44] See 125 Cong. Rec. S18564 (daily ed. Dec. 14, 1979) (Amendment No. 877 as modified), adopted at S18567 (Dec. 14, 1979). The compromise came only after six prior compromise proposals had collapsed. "This compromise that has been worked out looked like it was about to fall apart six times, and it did fall apart. It has been put together a seventh time, however . . . ." 125 Cong. Rec. S18570 (daily ed. Dec. 14, 1979) (remarks of Senator Percy).

[45] See 125 Cong. Rec. S18564, S18565 (daily ed. Dec. 14, 1979) (expressions of appreciation by Senators Dole and Nelson to Senator Stevens for his work on the compromise).

Senator Stevens, and Senator Stevens's unequivocal position opposing taxation of newly discovered Alaskan oil, all indicate that without the Alaska exemption the Tax would not have passed in its present form.[46]

The Alaska exemption was thus an integral part of the compromises necessary to secure final passage of the Act. The compromise package was, in essence, a unified decision to tax newly discovered oil in 49 states. Clearly it would not be consistent with Congressional intent for this Court to remove half the package (the Alaskan exemption) and to leave the other half (the inclusion of newly discovered oil). Such a revision would effectively "mutilate" the work of Congress. See *Williams* v. *Standard Oil Co.*, 278 U.S. 235, 242 (1929).

2. Senator Long's Isolated Remark Does Not Overcome the Clear Evidence of Congressional Insistence Upon the Alaska Exemption.

The Government lays great stress on selected portions of an observation by Senator Long on the Senate floor Gov. Br. 45-46. Senator Long at one point declared that if the courts should find that the Alaskan exemption violates the Uniformity Clause of the Constitution, "that provision should be regarded as a nullity and . . . Alaska will pay the same 30-percent tax on new oil as everybody else." 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980). But this observation is overwhelmed by the legislative history as a whole and was crucially qualified by Senator Long himself.

Whatever Senator Long's intent, the intent of Congress as a whole is quite a different matter. "[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102,

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[46] The Government suggests that, as no member of the Alaska delegation to Congress voted for the final bill, the exemption cannot have derived from a trade with that delegation. Gov. Br. 46-47 n.42. This misses the nature of the trade: Alaska exemption in exchange for release of the bill from the stalemate.

118 (1980). There was neither discussion nor vote on the issue of separability, and no separability clause was inserted in this Act. No thought similar to Senator Long's was expressed by any other Senator or in the House of Representatives. No Senator reacted in any way to Senator Long's observations. No committee report referred directly to separability; rather, the reports stress the exemption's importance and thus suggest its nonseparability.[47]

Moreover, Senator Long himself acknowledged that Congress would not be satisfied with the Act without the exemption. He said that if the tax were applied to the now exempt areas of Alaska, "we would expect to act in the future to remedy this and to try to provide some consideration based on the cost of transportation and the high cost of developing oil and producing oil in those areas north of the Arctic Circle, and those areas that are far removed from a pipeline or any kind of a feasible water transportation." 126 Cong. Rec. S3056 (daily ed. Mar. 26, 1980). In other words, even for Senator Long the Tax without the Alaska exemption could not stand in the form adopted. Taken as a whole, his statement reflects his recognition that the *specific circumstances* justifying a judicial decision to sever were absent in this instance: namely, confidence that Congress would be satisfied with the Tax *without* the exemption.[48]

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[47] This Court has emphatically recognized the "more authoritative" character of committee reports, see *United States* v. *O'Brien*, 391 U.S. 367, 385 (1968); *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969). Here the committee reports say nothing to support a belief that Congress would have accepted the bill without the exemption, and, in their stress on the importance of the exemption (see pp. 29-30, *supra*) give every possible support to the opposite view.

[48] Indeed, perhaps because of that recognition, Senator Long has since publicly expressed his view that the entire Tax should be invalidated. See News Release from the office of Senator Russell B. Long, November 5, 1982, quoted p. 5, *supra*.

B. The Precedents and Sound Policy Require Invalidation of the Tax Rather Than Its Extension to Transactions Expressly Exempted by Congress.

When a tax statute (or tax enforcement practice) is illegal simply because the legislature (or enforcing agency) has drawn a distinction that it is not legally entitled to draw, this Court's holdings on the matter have uniformly and unequivocally rejected the remedy of extending the tax. The leading case is *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), where the Court held as a substantive matter that state tax enforcement authorities had violated the Equal Protection Clause by taxing the shares of state banks more leniently than those of a similar national bank. The discrepancy arose because the county auditor had in violation of state law adjusted the treatment of state banks in their favor. *Id.* at 242. The Court rejected the proposed remedy of ordering those authorities to collect additional taxes from state banks. Writing for the Court, Justice Brandeis stated:

> "The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." 284 U.S. at 247.

Justice Brandeis cited an array of cases as "settling" the matter.[49] The same principle governs in this case.[50]

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[49] *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23 (1931); *Greene* v. *Louisville & Interurban Ry.*, 244 U.S. 499, 514-519 (1917); *Chicago Great Western Ry.* v. *Kendall*, 266 U.S. 94, 98 (1924); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441, 445-47 (1923).

[50] The Government seeks to distinguish *Iowa-Des Moines National Bank* on the ground that the illegal distinction was not statutory in origin and that "separability" as such was not at issue. Gov. Br. 49-50 n.45. But the "separability" issue is simply a phrase addressing the problem of remedy for an illegal statute. In fact, the reasons for judicial refusal to extend the tax are even *more* cogent when an invalid statute is involved. See pp. 41-44 below.

More recently, *Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), constitutes an application of the *Iowa-Des Moines National Bank* principle where the illegal differentiation occurred in a Congressional statute. Finding that Congress's provisions for eligibility for a specific deduction violated the equal protection concept implicit in the Due Process Clause of the Fifth Amendment, the Court cured the illegality by expanding the terms of eligibility to include the challenging taxpayer. *Moritz* is especially significant because it also involved the general severability provision relied on by the Government in this case. See p. 40, *infra*.

These decisions in the tax area represent a more general pattern: that of refusing to apply remedies that would chill the readiness of potential plaintiffs to litigate unconstitutional statutes or actions. Prospective plaintiffs, receiving little or no benefit from such a challenge, would lose the incentive to make it. As a consequence, such invalid statutes would remain in force. Thus, in a particular case severance might seem to reconcile the statute to the Constitution, but use of the doctrine in cases of unequal treatment would, in the end, disserve the Constitution.

The issue arises wherever government has drawn an unlawful distinction either in imposing a burden or conferring a benefit. The tax cases, obviously, represent an instance of the former. But the problem has arisen in many other contexts. In *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540 (1902), the Court held that an Illinois statute penalizing combinations in restraint of trade was illegal because of its exception for agriculturalists or live stock dealers.[51] The Court refused to cure the statute by extending its coverage to such exempted persons, saying that otherwise those persons should be penalized when it was clearly the legislature's intent that they not be.[52]

[51] *Tigner* v. *Texas*, 310 U.S. 141 (1940), overruled *Connolly* on that point, but not on the severability issue.

[52] Similar refusals to extend the burden occur in *Welsh* v. *United States*, 398 U.S. 333, 361-67 (1970) (Harlan, J., concurring) (extending draft exemption, *i.e.*, cutting back the scope of the burden en-

(footnote continues)

In a vast range of cases involving social insurance benefit programs, courts have similarly cured unconstitutional provisions for eligibility by extending benefits to the plaintiff excluded by the granting statute. The alternative remedy—contracting the benefit program—would have had the effect of signaling to plaintiffs that they had nothing to gain by challenging the legislative criteria.[53] Thus, in a wide variety of situations, courts have been alert to the necessity of structuring relief so that at least some persons adversely affected by an unconstitutional classification will have an incentive to bring the violation to the attention of the courts.

The Government lays great stress upon the dictum of Justice Sutherland in *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932). Gov. Br. 49. In addition to being dictum, the language is of little relevance, since the Court there found that "[t]he primary object of the statute, under review, plainly, is to raise revenue. The exemption . . . and the provisions for carrying that exemption into effect are secondary." *Id.* at 185. Although Congress obviously enacted the Windfall Profit Tax to raise

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(footnote continued)

tailed by the draft); *Skinner* v. *Oklahoma*, 316 U.S. 535, 542-43 (1942) (striking statutes providing for sterilization of certain habitual criminals rather than curing it by extending its burden to embezzlers); *Marchetti* v. *United States*, 390 U.S. 39, 59-60 (1968) (upholding defendants' assertion of their Fifth Amendment privilege against self-incrimination, as a defense against prosecution under federal wagering tax statutes, rather than merely imposing restrictions on use of information obtained by compliance with the statutes).

[53] *Frontiero* v. *Richardson*, 411 U.S. 677, 691 n.25 (1973) (service benefits); *Califano* v. *Westcott*, 443 U.S. 76, 89-93 (1979) (welfare benefits); *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973) (welfare benefits); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (welfare benefits); *Vaccarella* v. *Fusari*, 365 F. Supp. 1164, 1170 (D. Conn. 1973) (unemployment compensation); *Bowen* v. *Hackett*, 361 F. Supp. 854, 862 (D.R.I. 1973) (unemployment compensation); *Robison* v. *Johnson*, 352 F. Supp. 848 (D. Mass. 1973) (veterans' educational benefits); *Jablon* v. *Secretary of Health, Education and Welfare*, 399 F. Supp. 118 (D. Md. 1975), *aff'd*, 430 U.S. 924 (1977) (social security benefits).

revenue, it crafted the Tax with intense concern lest it unduly discourage domestic oil production and thereby increase dependence on foreign energy supplies. See pp. 28-31, *supra*. Nothing in *Utah Power & Light Co.* suggests that any parallel concern animated the Idaho legislature's structure of the tax there at issue. There is nothing "secondary" about the Alaska exemption; the Windfall Profit Tax would not have arisen without it.

Moreover, in the era of that decision, state legislatures typically sat for only a brief period every two years. Until its amendment in 1968, for example, Article 3, § 8 of the Idaho Constitution provided for biennial sessions. See 1 Idaho Code Ann. 132 (1980). Judicial invalidation of a tax under such circumstances might leave a state without a critical source of revenue for an extended time. By contrast, Congress is currently in session almost without interruption and can readily enact substitute legislation.

After the decision in *Utah Power & Light Co.*, this Court not only reaffirmed Justice Brandeis's holding in *Iowa-Des Moines National Bank* v. *Bennett*, *supra*, but stressed the importance of its remedial principle:

> "The constitutional requirement [of non-discriminatory treatment], however, is not satisfied if a State does not itself remove the discrimination, but imposes upon him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class." *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946).[54]

Clearly, then, the *Utah Power & Light Co.* dictum has in no way undermined the proposition, said by Justice Brandeis to be "settled," "that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law, cannot be required himself to assume the bur-

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[54] In support of the decision, the Court cited *Iowa-Des Moines National Bank* and two of the cases relied upon therein by Justice Brandeis. *Hillsborough* held that the remedies provided by the state were inadequate and that federal jurisdiction would lie.

den of seeking an increase of the taxes which the others should have paid." *Iowa-Des Moines National Bank* v. *Bennett*, *supra*, 284 U.S. at 247. That principle is fully applicable to the present case, and calls for invalidation of the Tax as a whole.

C. Section 7852(a), the Internal Revenue Code's General Separability Provision, Provides No Basis for Judicial Extension of the Windfall Profit Tax to Alaska.

Lacking a separability provision in the Tax itself, the Government relies on the general separability clause designed to save the Internal Revenue Code as a whole. 26 U.S.C. § 7852(a) provides:

> "If any provision of this title, or the application thereof to any person or circumstance, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby."

On its face, this provision invalidates the Tax and not the Alaska exemption. Section 7852(a) is manifestly intended to save the Internal Revenue Code as a whole (the "title" referred to in Section 7852(a)) by authorizing the courts to sever and delete provisions or applications that unlawfully *tax* certain persons or circumstances. In the instant case the "invalid provision" (within the meaning of that section) is the *Windfall Profit Tax by reason of its nonuniformity*. There is nothing invalid about a congressional decision not to tax Alaska oil; what is invalid is the imposition of a tax on oil in only 49 states. The straightforward application of Section 7852(a), therefore, is to invalidate the Windfall Profit Tax, not the exemption.[55]

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[55] Compare *Minneapolis Star Tribune Co.* v. *Minnesota Commissioner of Revenue*, No. 81-1839, White, J., *Concurring and Dissenting*, slip op. at 1 (U.S. March 29, 1983). The Government repeatedly seeks to blur this central distinction by describing the Alaska exemption as if it were itself unconstitutional, something that appellants have never asserted. Thus, the Government brief—in the very caption of its separability argument—asserts that "even if the Alaska oil exemption violates the uniformity clause," separability is appropriate. Gov. Br. 43. It repeatedly implies that at worst, it is the exemption that is "bad" (*id.* at 43) or "the unconstitutional portion" (*id.* at 44) or "the invalid portion" (*id.* at 44, 46, 48) or "barred." *Id.* at 50.

Section 7852(a) has once been considered in the context of a tax provision that illegally differentiated between taxpayers; its application by the Court was exactly congruent with appellees' contention here. In *Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), the court considered Section 214(a) of the Code, which allowed a wide variety of persons to take a particular deduction, but denied it to a man who had never been married. In a suit by an ineligible taxpayer, the Court held the restrictive classification invalid under equal protection principles. By way of relief, it granted eligibility to the plaintiff taxpayer rather than striking down the deduction. Thus the Court *restricted* the application of the income tax. The parallel solution in our case is to extend the benefit of the exemption afforded Alaska—to strike down the Windfall Profit Tax.[56]

Alternatively, even if the Alaska exemption could be conceived of as an "invalid provision" within the meaning and purposes of Section 7852(a), the clause would not require the Court to sever the Alaska exemption rather than invalidate the Tax. The cases, cited in the margin, confirm that a separability clause is an aid in determining legislative intent, not an inexorable command.[57] In *Williams*, this Court made clear that a separability provision does no more than reverse the normal presumption that an act should stand or fall as a whole. Invalidation of the enactment as a whole remains proper when the court finds a "clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains." 278 U.S. at 242. Similarly in *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935), this Court declared:

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[56] This treatment of Section 7852(a) is consistent with *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), discussed p. 35, *supra*.

[57] *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330 (1935); *Williams* v. *Standard Oil Co. of Louisiana*, 278 U.S. 235 (1929); *Dorchy* v. *Kansas*, 264 U.S. 286 (1924).

> "[N]otwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." 295 U.S. at 362.[58]

Thus, even if the literal terms of Section 7852(a) applied to the Alaska exemption, the necessary inquiry into legislative purposes would remain. That history shows not just the "clear probability" but the certainty that Congress would not have adopted the Tax in its present form without the Alaskan exemption. Extension of the Tax to Alaska would thwart a critical intention of Congress—that the Windfall Profit Tax not operate unduly to discourage development of Alaska's vast oil resources.

D. Congress Is Best Able to Resolve the Sensitive and Difficult Policy Issues that Are Involved in Remedying the Invalid Tax.

Any cure of the Windfall Profit Tax will have a dramatic impact upon taxpayers and on the prospects for domestic energy independence. The policy values at stake require Congressional action—not only because of Congress's capacity to make essentially legislative trade-offs between such values but also because of its ability to adjust all the provisions of the Tax that are necessarily affected.

First, extension of the Windfall Profit Tax to Alaska would unfairly affect taxpayers who, in reliance on the exemption from the Tax, have since enactment of the Tax invested hundreds of millions in the exploration and development of Alaskan properties. Atlantic Richfield alone has invested $700 million in the development of the Kuparuk River field and at least another $36 million in acquisition of leaseholds in exempt areas above and below the Arctic Circle (see Brief *Amicus Curiae* of

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[58] Moreover, where the separability clause relied on is a general separability clause in a preexisting statute, its aid in determining legislative intent is very much weakened. 2 *Sutherland, Statutory Construction* § 44.11, at 356 (4th ed. C. Sands 1973).

Atlantic Richfield Company at 2). Indeed, the element of unfair surprise in such a retroactive tax itself raises serious Constitutional problems, even if it were done by Congress. See *Nichols* v. *Coolidge*, 274 U.S. 531, 542-43 (1927).

Second, imposition of the Tax on Alaska would also materially increase the nation's dependence on imported oil, and the risks inherent in such dependence. The Government notes that "a relatively small reduction in the price of oil during 1982 led to a slowdown of development in the Kuparuk River field" (Gov. Br. 19-20 n.26). An increase in tax, reducing the after-tax return, would have an identical impact. Congress is best able to avert these risks, and could enact an appropriate tax which shelters Alaskan production from this burden by Constitutional means.

Third, the large number of possible methods of saving the Tax itself counsels in favor of letting the Congress choose which legislative solution best meets our nation's interests. The Government alone in the course of this litigation has suggested no less than three cures: (1) extension of the Tax to Alaska, (2) exemption of newly discovered oil (see Gov. Br. 50-51 n.46), and (3) extension of the exemption to production "in all areas similar to the Arctic Circle or located more than 75 miles from a pipeline connection" (see Reply Brief for the Defendant United States of America and in Opposition to Motions for Summary Judgment, at 10).[59] These alternatives obviously carry radically different implications for revenue generation, disincentive to exploration and development of oil, and fairness to all taxpayers.

This Court has clearly recognized the wisdom of leaving to Congress the basic resolution of such critical policy choices. In *Marchetti* v. *United States*, 390 U.S. 39 (1968), for example, this Court refused a government invitation to save the occupa-

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[59] The final suggestion has evidently been dropped from the list of Government proposals.

tional wagering tax by restricting the use of information thereby obtained. Explaining its refusal, the Court said:

> "We cannot know how Congress would assess the competing demands of the federal treasury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values." 390 U.S. at 59-60.[60]

Fourth, an attempt to adopt any of the Government's proposals would require resolution of several interstitial problems, which are best left to the Congress. The Government's suggestion to judicially extend the Tax to Alaska, for example, would require the Court to decide the issue of whether the "TAPS adjustment," which under the original statute reduced the Tax on Sadlerochit oil (see Section 4996(d)), should be extended to the areas of Alaska that were originally exempt. The question is doubly perplexing because of Congress's subsequent repeal of the TAPS adjustment. See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, § 284. Again, in calculating the $227.3 billion in net revenue, collection of which triggers the start of a 33-month phaseout of the Tax (but no sooner than January 1988 and no later than January 1991), should the new judicially mandated revenues from Alaska be included? The legislative character of these choices is obvious.

Finally, Congress possesses broad power to enact substitute oil or energy tax legislation which could neutralize any effect that invalidation of the tax might have on the budgetary process. Changes in circumstances, wholly independent of this litigation, have already reduced by 75 percent the amount of revenue that the tax is expected to generate in future years.[61]

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[60] See also *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 102 S. Ct. 2858, 2880 n.40 (1982).

[61] In lieu of the original estimates that the Tax would yield approximately $21 billion in net revenue annually, the Government has recently issued estimates of $5 billion per year ($30 billion over the next *six* years). See Government's Motion to Set the Case for Oral Argument During the Present Term of Court at 2.

The Congress alone is best able to custom-tailor new laws to address rapidly changing conditions and national needs.

Construction of a proper tax—which passes Constitutional muster—is a peculiarly legislative decision that will have an enormous impact on taxpayers and on critical national energy policies. Its design will require delicate balancing of policy values that is properly reserved to the Congress. In the absence of a mandate to the contrary from Congress, one may safely conclude that Congress would desire to resolve such issues itself.

CONCLUSION

The Uniformity Clause requires that, in enacting excise taxes, Congress adhere to the principle of geographic uniformity and frame exceptions in functional terms such as severe climate or high production costs. Taxpayer appellees have been subjected to a severe burden by a Tax that disregards this simple requirement. Given this clear constitutional infirmity, the Court should affirm the District Court decision which invalidates the Tax, so that Congress can determine what tax provisions are appropriate in light of the relevant legislative policies including revenue need, fairness to taxpayers, and encouragement of domestic oil production.

Respectfully submitted,

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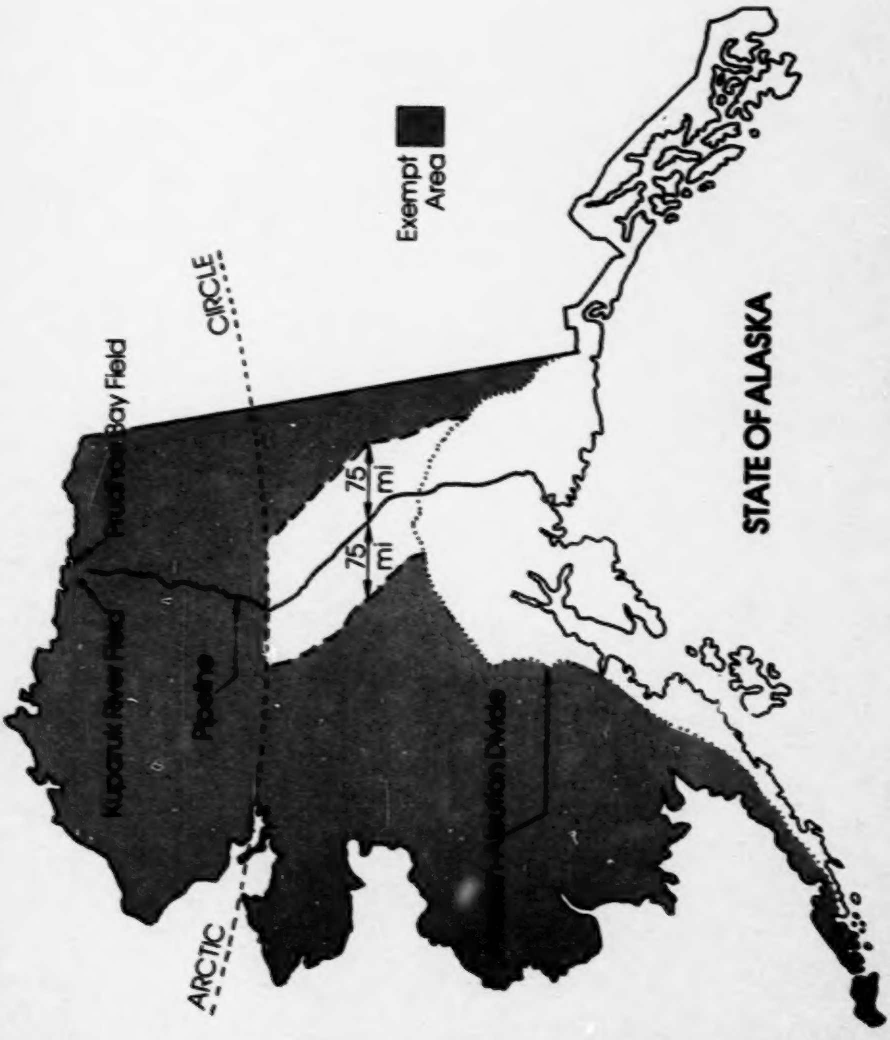
APPENDIX A



STATE OF ALASKA